(12)

No. 87-1241

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, Petitioner

vs.

UNION GAS COMPANY, Respondent

BRIEF FOR RESPONDENT

Robert A. Swift
(Counsel of Record)
Marguerite R. Goodman
KOHN, SAVETT, KLEIN & GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, PA 19107
(215) 238-1700

Lawrence Demase
ROSE, SCHMIDT, CHAPMAN,
DUFF & HASLEY
900 Oliver Building
Pittsburgh, PA 15222
(412) 434-8610

SMITH-EDWARDS-DUNLAP COMPANY, 2987 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 426-6900

QUESTIONS PRESENTED

1. Whether CERCLA's language unmistakably expresses Congress' intention to abrogate Eleventh Amendment immunity?

2. Whether the Eleventh Amendment precludes federal courts from asserting jurisdiction only in diversity of citizenship cases between a defendant state and a citizen of a different state?

3. Whether Article I of the Constitution empowers Congress to abrogate state immunity to private lawsuits?

4. Whether state consent to suit is a prerequisite to congressional abrogation?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

2. United States Code, 42 U.S.C. §§9601(21) and 9607(a), P.L. No. 96-510, 94 Stat. 2767 [Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980 ("CERCLA")]:

> 9601(21) 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission,

political subdivision of a State or any interstate body;

9607(a) . . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

3. United States Code, 42 U.S.C. §9601(20)(D) and 9620(a)(1), P.L. No. 99-499, 100 Stat. 1613 [Superfund Amendments and Reauthorization Act of 1986 ("SARA")]:

9601(20)(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107.

9620(a)(1) In general.—Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both

procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

STATEMENT OF THE CASE

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pennsylvania in October 1980 caused the United States to declare the site the nation's first emergency Superfund site. A map of the site is contained in the Joint Appendix at J.A. 108. Adjacent to the stream from 1890 to 1948 in an industrial section of Stroudsburg had been a carburetted water gas plant which produced coal gas as well as its by-product, coal tar. While some constituents of coal tar are now defined as hazardous substances under CERCLA (J.A. 51), the EPA regards in-ground disposal of coal tar as state of the art technology during the first part of this century (see EPA Amended Fund Authorization Report). The plant was dismantled in 1948 and replaced successively by propane and natural gas distribution systems. The Company operating the plant changed ownership several times before being merged into respondent in 1978.

Between 1960 and 1962 the State rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its sides. The Borough of Stroudsburg and later the State obtained a permanent easement or fee title to much of the site. (J.A. 98-99) The rechannelization of this fast flowing stream started a process of downcutting of the stream bed and erosion of the toe of the dike that led to the release of coal tar during the period that the State was an owner and operator of the site. It was during repairs to the toe of the dike that coal tar was first discovered. Between April 1981 and January 1982, the United States did a cleanup of the site at an alleged expense of $967,000.00. The United States contended that there was a continuing release and threat of release of coal tar

which was not abated until the cleanup was complete. (J.A. 50) In 1984, Pennsylvania entered into a Multi-Site Cooperative Agreement with the United States covering the Brodhead Creek site whereby Pennsylvania agreed to take the lead in continuing remedial activities under the authority and funding of CERCLA. (J.A. 100-107)

The United States commenced this lawsuit on May 23, 1983 in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs pursuant to CERCLA and the Clean Water Act, 33 U.S.C. §§1321(b)(3) and (f)(2), naming respondent as the sole defendant. (J.A. 5) Respondent filed a third-party complaint naming the Commonwealth of Pennsylvania and the Borough of Stroudsburg as third party defendants alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. §9601(20)(A), and, together with others, negligently caused or contributed to the release of coal tar. (J.A. 37)

The State moved to dismiss the third-party complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) alleging that it was immune to suit under CERCLA pursuant to the Eleventh Amendment to the Constitution. The district court granted the State's motion. (J.A. 45) Thereafter, the United States filed an amended complaint revising its damage claim, and respondent filed an amended third-party complaint. (J.A. 46 and 81) The State again moved to dismiss, and the district court granted the motion for the reasons set forth in its earlier opinion. (J.A. 95)

As a result of a settlement reached among the United States, respondent and the Borough of Stroudsburg whereby respondent paid a major portion of the cost of cleanup, the district Court dismissed the action. (J.A. 96) Respondent then appealed the district court's dismissal of Pennsylvania as a defendant to the United States Court of Appeals for the Third Circuit. A two member majority of the Third Circuit affirmed the district court's order, with the Honorable A. Leon Higginbotham filing a vigorous dissent concluding that CERCLA

clearly abrogated states' Eleventh Amendment immunity. (Pet. App. 74a)

On October 17, 1986, shortly after respondent filed a petition for certiorari with this Court, the President signed into law SARA, which amended CERCLA. At the urging of respondent herein and the United States, which as amicus contended SARA "authorizes suits against states or local governments for liability or contribution when such entries caused or contributed to the release or threatened release of a hazardous substance," (Amicus Br. at 5-6) this Court granted certiorari, vacated the court of appeals' opinion, and remanded for consideration in light of SARA.

On remand, the court of appeals unanimously reversed the district court holding that the Eleventh Amendment does not bar suit against Pennsylvania. (Pet App. 1a) The court of appeals further held that (1) the language of CERCLA, as amended by SARA, clearly and explicitly abrogated state immunity, (2) Congress may, consistent with the Constitution, abrogate state immunity in an Article I enactment, and (3) CERCLA, as amended by SARA, applies retroactively to respondent's cause of action.

SUMMARY OF ARGUMENT

1. CERCLA, as amended by SARA, satisfies the clear statement rule by providing in unmistakable language Congress' intention to render states liable for damages to private parties. When Congress defines a "person" liable under section 107(a) to include a "state" and then provides that a state "shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [107]," Congress' intention to abrogate states' immunity is unmistakably clear. A contrary interpretation would frustrate the carefully devised legislative scheme of this "comprehensive" legislation and hinder voluntary clean-

ups at a significant number of hazardous waste sites throughout the nation.

2. This Court should overturn *Hans v. Louisiana*. The Eleventh Amendment is a jurisdiction preclusion provision that prohibits federal courts from asserting jurisdiction only in diversity of citizenship cases between a defendant state and a citizen of a different state. State sovereign immunity is not embodied in the Eleventh Amendment or any other part of the Constitution. *Hans'* prohibition of federal court jurisdiction as to all private party actions against states is founded on misinterpretation of precedent and has led to a befuddling progeny of cases creating rules and exceptions. Overturning *Hans* will simplify Eleventh Amendment jurisprudence while causing only minor change in the results of past decisions of this Court.

3. Congress may abrogate state immunity from private suits for money damages pursuant to its Article I powers. Intrinsic to the design of the Constitution, the federal courts possess jurisdiction coextensive in scope with Congress' power to enact Article I legislation such as CERCLA. Textually, the Eleventh Amendment places no restriction on Congress. To secure enforcement of its enactments, Congress may properly abrogate state immunity from private lawsuits. A contrary result would force private parties like Respondent herein to pay for a state's wrongdoing.

4. State consent to suit is superfluous where, as in CERCLA, Congress abrogates state immunity to suit.

ARGUMENT

I. CERCLA'S LANGUAGE UNMISTAKABLY EXPRESSES CONGRESS' INTENTION TO ABROGATE ELEVENTH AMENDMENT IMMUNITY

A. The Purpose of CERCLA Is To Redress a Festering National Environmental Problem

Following a decade or more of piecemeal environmental legislation that engendered more disputes and rulemaking

than cleanups, Congress in 1980 enacted CERCLA to provide a thorough-going framework for the cleanup of hazardous waste contamination. Earlier attempts to cleanup the environment proved difficult to enforce, were laced with statutory and regulatory exceptions, lacked sufficient funding and only controlled current, not past, contamination. The patchwork quilt of hazardous waste regulation in the Clean Air Act, 42 U.S.C. §7401 *et seq.*, the Clean Water Act, 33 U.S.C. §1251 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. §3251 *et seq.*, lent neither focus nor muscle to a national cleanup policy. Importantly, each expressly preserved the states' Eleventh Amendment immunity. *See* 42 U.S.C. §7604; 33 U.S.C. §1365; 42 U.S.C. §6967.

CERCLA, by imposition of strict liability on the basis of past and present status and application to releases of hazardous substances no matter how small the quantities, represented a radical departure from prior law. CERCLA was intended as a comprehensive approach to the cleanup of the nation's pollution sites amid congressional apprehension of a pollution crisis. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 506 (1986).

A major objective of CERCLA was to encourage the voluntary cleanup of contamination sites. The statute and its legislative history emphasize the need for voluntary cleanup. *See, e.g.*, 42 U.S.C. §9612(a); H. Rep. No. 96-1016, Part I, 96th Cong. 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6120 (purpose of bill is to "induce such persons voluntarily to pursue appropriate environmental response actions"). Congress recognized in 1980, as well as when CERCLA was amended by SARA in 1986, that the trust fund created by CERCLA to fund cleanups was grossly insufficient to pay the cost of all cleanups.[1] Both the cost of cleanup

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1. *See*, e.g. Legislative History of the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L. 96-510, Vol. 1, p. 101 (Statement of Thomas C. Jorling, Assistant Administrator Water and

and the number of potentially responsible parties made voluntary cleanups difficult. To encourage voluntary cleanups, Congress provided a statutory incentive: the right to obtain restitution from responsible parties.

Congress authorized, in section 107(a) of CERCLA, a "person" to recover necessary costs of response from any other "person." Congress defined person in the broadest sense possible:

> "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a State or any interstate body. 42 U.S.C. §9601(21) (emphasis added)

The inclusion of states in the definition of person was no accident. Congress intentionally departed from the format of its three prior environmental enactments where it immunized states from liability. Under CERCLA all political entities, even the federal government, were potentially liable to any other person who incurred cleanup costs.

Congress was well aware of state ownership and operation of contamination sites when it enacted CERCLA. States and local governments have for decades played a major role in managing the disposal of hazardous substances and have often been owners and operators of such sites. Indeed, the EPA has estimated that over 16% of all contamination sites on the National Priorities List are currently owned or controlled by states and local governments. (Estimate provided by EPA

Waste Management, June 20, 1979), Vol. 2, p. 252 (Statement of Representative Rostenkowski; H. Rep. 99-253, Part 1, dated August 1, 1985, prepared to accompany H. Rep. 2817) ("EPA will never have adequate monies or manpower to address the problem itself . . . Congress must facilitate cleanups of hazardous substances by the responsible parties"); and Interim Report of the Surveys and Investigations Staff of House Committee on Appropriations, March 14, 1988 (SARA legislative history makes evident that Congress recognized that without a highly successful enforcement program, EPA would never achieve the objectives of SARA because EPA by itself could never secure the financial and human resources required to resolve the problems).

Office of Emergency and Remedial Response, July 1, 1988.) Some of these sites are infamous. For example, in Mason County, West Virginia, the West Virginia Ordnance site, originally a 8,000-acre ordnance works run by the U.S. Army during World War II, is currently owned and operated by West Virginia as a wildlife refuge and for hunting and fishing. Land and water in the refuge has been contaminated with chemicals used in the manufacture of trinitrotoluene (TNT). EPA, Descriptions of Sites on Current National Priorities Lists, October 1984, 548 (Dec. 1984). In Pennsylvania, a foul-smelling sulfurous black liquid discharging from an abandoned gas well is threatening use of the Presque Isle State Park, a major recreational area on Lake Erie. *Id.* at 459. In Hillsboro, Kentucky, there is an estimated 4.8 million cubic feet of waste containing radioactive material at a state owned 279-acre site. EPA, Descriptions of Sites on Update No. 2 to National Priorities List, Oct. 1984.

Thus, the inclusion of states within the definition of persons liable under CERCLA was essential to Congress' bold and innovative plan to rid the nation of hazardous waste contamination.

B. CERCLA's Language Satisfies the Clear Statement Rule

Beginning with the decision in *Employees v. Department of Public Health*, 411 U.S. 279 (1973), this Court has constructed what has come to be known as the "clear statement rule" for testing congressional abrogation of state immunity. The clear statement rule requires that Congress express its intention to abrogate the Eleventh Amendment "in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). *See also Welch v. State Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). A unanimous court of appeals in *Union Gas II* correctly applied this standard when it held that CERCLA, as amended by SARA, possesses "the requisite un-

mistakably clear language needed to abrogate the states' eleventh amendment immunity."[2] 832 F.2d at 1345 (Pet. App. 7)

In CERCLA, Congress abrogated state immunity in the most direct and logical manner: it defined a "person"–liable under section 107(a) to include a state. 42 U.S.C. §9601(21). Judge Higginbotham, dissenting in *Union Gas I*, explained:

> When a statute in its definitional section declares unequivocally that the term "person" includes a "*State*, municipality, commission, political subdivision of a *State*, or any interstate body" 42 U.S.C. §9601(21) (emphasis added), the explicit language of Congress should not be disregarded where there is no legislative history suggesting that Congress did not mean what they said when they used the word "state." 792 F.2d at 383 (Pet. App. 119)

Judge Higginbotham went on to observe that courts should not assume that they have a better mastery of the English language than does Congress. Not to acknowledge that Congress meant to include states in the definition of "person" would require Congress to engage in unprecedented redundancy and repetition within the definition. As this Court observed in *United States v. California*, 297 U.S. 175, 186-187 (1936): "Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts and whose application in the circumstances would be highly artificial."

This Court's decision in *Employees* is not, as contended by Pennsylvania, dispositive of whether inclusion of "state" within the statutory definition satisfies the clear statement rule. At issue in *Employees* was whether a 1966 amendment to the definition of "employer" in the 1938 Fair Labor Standards Act (FLSA) sufficiently evidenced congressional intent to abrogate state immunity which the states had enjoyed for over 35 years. Since Congress had not made a coordinate

2. All other lower courts that have considered this issue have reached the same result as the Third Circuit: *Wickland Oil Terminals v. Asarco, Inc.*, 654 F.Supp. 955 (N.D.Cal. 1987); *United States v. Freeman*, 680 F.Supp. 73 (W.D.N.Y. 1988).

change in the FLSA's liability section and there was no other evidence in the statute or legislative history, this Court held the clear statement rule was not satisfied. CERCLA, by contrast, has other statutory indicia of congressional intent to render states liable. Furthermore, the definition of "person" in CERCLA closely resembles the definition of "person" in Title VII of the Civil Rights Act which this Court did find sufficient to show congressional intent to render states liable in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) ("the 'threshold fact of congressional authorization' to sue the State as employer is clearly present").

Congress' intent to subject states to liability to private parties under section 107(a) is further evident in the inclusion of the federal and local governments in the definition of "person." Section 107(g) of CERCLA expressly waives the federal government's sovereign immunity. Thus, it is unimaginable that by enacting a "comprehensive" environmental law to clean up all the nation's waste sites which renders every private individual and legal entity potentially liable, including the federal government, Congress intended to omit states when it expressly included them.

At the time a divided panel of the court of appeals in *Union Gas I* found CERCLA's original language did not meet the clear statement rule, a Congressional conference committee was meeting to reconcile and compromise two substantially different versions of SARA that had been passed by the House and Senate in December 1985. *See*, H. R. 2817, 99th Cong., 1st Sess. (1985) and H. R. 2005 (1985). SARA was signed into law by the President on October 17, 1986. Just as Congress had legislatively changed the outcome in *Employees* and *Atascadero*,[3] through SARA Congress amended CERCLA to show with more specificity its intention that states were potentially liable to private parties under section 107(a) of

3. Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. §216(b), was amended in 1974 by Pub.L. 93-259, §6(d)(1), 88 Stat. 61. Section 504 of the Rehabilitation Act, 29 U.S.C. §794, was amended by Pub.L. No. 99-506, §1003, 100 Stat. 1807 (1986) (codified at 42 U.S.C. §200 d-7) (West Supp. 1987).

CERCLA. As stated by the identical, but now unanimous, panel that had decided *Union Gas I*: "In SARA, however, Congress enacted the unmistakably clear statutory language that demonstrates its intent to abrogate the states' eleventh amendment immunity." 832 F.2d at 1348 (Pet. App. 21-22)

In particular, SARA amended the definition of "owner or operator" to provide that states would not be liable if they acquired ownership or control of a contaminated site involuntarily through bankruptcy, abandonment, tax delinquency or other similar circumstance unless they caused or contributed to a release. But otherwise, ". . . such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." This language not only affirms that Congress always intended states to be liable to all other persons for cleanup costs, but replicates the language Congress used in waiving federal liability for cleanup costs.[4] The federal waiver was recodified by SARA from section 107(g) to section 120(a)(1) and provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.

4. As the court of appeals in *Union Gas II* explained:

Originally, neither the Senate nor House version of SARA §101(b)(1) copied the waiver language of ¶9607(g) to abrogate state eleventh amendment immunity. However, the conference committee inserted language that replicated the federal waiver into the definition section, stating that its purpose was "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively, as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 185-86, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3276, 3278-79. To the extent that the added language serves to "clarify" CERCLA, it amounts to a subsequent declaration of congressional intent that deserves great weight. *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-82, 89 S.Ct. 1794, 1801-02, 23 L.Ed. 2d 371 (1969). 832 F.2d at 1350 (Pet. App. 32-33)

Although Pennsylvania chides the court of appeals for misinterpreting SARA's amendment to "owner or operator," its alternative explanation is illogical. Pennsylvania contends that the amendment was to clarify only that states are not liable to private parties when states involuntarily acquire a site unless they cause or contribute to a release. There are two fallacies to this contention. First, an exclusion of liability would have meaning only so long as Congress understood section 107(a) to render states liable. Second, under this contention states would not be liable for cleanup at sites they acquired *voluntarily* where they caused releases of hazardous substances. Thus, a state could purchase a site voluntarily, pollute it, and not be liable for a private party's (perhaps a neighboring land owner's) cleanup costs, but would be liable if the site were acquired through abandonment. Such a construction is neither logical nor equitable.

To overcome the court of appeals' decision, the conference committee surgically grafted language to several sections to overcome the deficiencies cited in the court of appeals' analysis.[5] The above-quoted language was added to the definition of "owner or operator." Local governments were referenced in the language because of a footnote in *Union Gas I* that suggested that local governments may be able to derive immunity through the Eleventh Amendment. 792 F.2d at 375, n. 3 (Pet. App. 80). Because the court of appeals had

5. Because *Union Gas I* was not a decision of this Court, the joint committee may not have felt the urgency of addressing it in a separate section as opposed to the changes it did make. Returning to Judge Higginbotham, he observed "we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel." *Union Gas I*, 792 F.2d at 386 (dissenting) (Pet. App. 135)

relied in *Union Gas I* on the federal government's explicit waiver of immunity to distinguish state immunity, the conference committee added a sentence to the federal waiver: "Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107." 42 U.S.C. §9620(a)(1)

Another indication of congressional intent to make states liable for cleanup costs to private parties under section 107(a) is that Congress preserved states' immunity to citizen suits in SARA. See 42 U.S.C. §9659(a)(1). Unlike section 107(a) which requires a plaintiff to have incurred cleanup costs prior to initiating suit, the citizen suit provision permits anyone to commence an action as a private attorney general to obtain an order correcting a violation of CERCLA. Congress' express preservation of states' Eleventh Amendment immunity from citizen suits thus stands in sharp contrast to section 107(a) liability where there is no such preservation of immunity.

C. Construing CERCLA to Permit Persons to Sue States Promotes the Purposes of the Act

The above construction of CERCLA is not only true to the text of the statute and congressional intent, but it promotes the goals of the Act. Even the expanded funding of the trust fund by SARA will fall far short of providing enough money to cleanup just those contamination sites listed on the NPL. *See*, Staff of House Comm. on Appropriations, 100th Cong., 2nd Sess., Report on Status of Environmental Protection Agency's Superfund Program (March 14, 1988); Mackerron, "Superfund: Uncle Sam Picks Up the Tab," Chemical Week, June 8, 1988, at 22-25. Since its first publication, the NPL has grown threefold and is still increasing. *See*, National Priorities List for Uncontrolled Hazardous Waste Sites—Update 7, 53 *Fed. Reg.* 23,987, 23,989 (1988) (to be codified at 40 C.F.R. Part 300, Appendix B) (proposed June 23, 1988). Absent voluntary cleanup by persons willing to expend substantial funds and other resources, most of the nation's contamination sites will

not be cleaned and we will pass, with barely a genuflection, our chemical and health problems to another generation.[6]

The principal incentive to a voluntary cleanup is the right to recover the necessary costs of cleanup from responsible parties under section 107(a). If states were eliminated from "persons" that could be sued to recover such costs, there would be a powerful disincentive to any cleanup efforts by private parties. Since CERCLA gives the federal courts exclusive jurisdiction over CERCLA causes of action, a private party cannot go into state court to recover from a state. Under Pennsylvania's view, whenever a state is arguably responsible for some portion of the cleanup costs under the statute, a private party is better off taking no action at all in the hope that the United States will cleanup the site and seek reimbursement from the state. In that way, a private party will not be left, as Union Gas was here, paying the state's share of cleanup costs. By the same token, states will have every incentive to resist participating in any voluntary cleanup in the hope that private parties will do the job and be unable to recoup any part of the cost from the state. Thus, Pennsylvania's view would frustrate the "comprehensive" plan of cleanup underlying CERCLA and leave private parties, such as Union Gas, to pay for contamination caused by states.

Inclusion of states among potentially responsible parties serves an additional salutary, if less obvious, purpose. The United States EPA has been criticized by its own inspector general for paying excessive amounts for emergency cleanups.[7] If states have a direct monetary interest in wanting to

6. *See*, "Delays and Inefficiencies in the Superfund Program: Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works," 100th Cong., 1st Sess. (1987) (testimony and statement of James W. Moorman, Esq., former Assistant Attorney General for Land & Natural Resources, U.S. Dept. of Justice; remarks for Sen. Lautenberg) (Dec. 10, 1987); Assistant Attorney General for Land & Natural Resources, U.S. Department of Justice, December 10, 1987, and written testimony of Natural Resources Defense Council, December 10, 1987.

7. See EPA, Report of Audit, No. E5E26-05-0101-61508, Sept. 23, 1986.

reduce costs at sites for which they are responsible, they are in a stronger position to encourage a cost-effective cleanup. Cost effectiveness has many facets, from defining the scope of testing and evaluation, to the selection of a cleanup methodology, to the selection of a contractor. All these are areas that can be improved upon by direct state involvement to protect their pecuniary interest.

Pennsylvania and the amici states raise the spectre of potential burgeoning liability for waste sites. Unquestionably the cost of cleanup of all sites throughout the nation is expensive. The Department of Energy, for example, estimates its liability for cleanup of contamination at $100 billion.[8] The Department of Defense estimates its cost at $14.8 billion.[9] The cost of the cleanups to private parties has also been enormous. This Court has already answered the states' argument in *Employees* where it acknowledged that Congress acting under Article I could "place new or even enormous fiscal burdens on the States." *Supra.*, 411 U.S. at 284. States, however, have the same right as other "persons" liable under CERCLA to seek contribution from other responsible parties and have the court equitably allocate cleanup costs among all responsible parties. *See* 42 U.S.C. §9613(f)(1).

II. THE ELEVENTH AMENDMENT PRECLUDES FEDERAL COURTS FROM ASSERTING JURISDICTION ONLY IN DIVERSITY OF CITIZENSHIP CASES BETWEEN A DEFENDANT STATE AND A CITIZEN OF A DIFFERENT STATE

A. As Drafted in 1787, the Constitution Did Not Provide for State Sovereign Immunity in Federal Courts

When submitted to the states for ratification, the Constitution lacked any provision granting states sovereign immunity in the federal courts. Nor was there any reason to provide such immunity. The Constitution was a compact among the people of the United States to create a federal form of government.[10] *See*, Amar, "Of Sovereignty and Federalism," 96 Yale L.J. 1425, 1439 (1987). The Constitution was ratified, not by state legislatures, but by constitutional conventions whose delegates were selected by the people.

State sovereignty that existed prior to 1787 was revoked and bestowed on a new federal sovereign to the extent necessary for the federal sovereign to exercise its powers. *See* Fletcher, "A Historical Interpretation of the Eleventh Amendment," 35 Stanford L.Rev. 1033, 1069 (1983). As James Madison stated in *The Federalist*, "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." *The Federalist*, No. 45 at 289 (C. Rossiter ed. 1961). The states, thus, were stripped of sovereign immunity—in the then-prevalent international sense—that they enjoyed prior to ratification of the Constitution. Though not expressed in the Constitution until adoption of the Tenth Amendment, states remained sovereign within their borders as to matters not bestowed on the federal government. *See, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549-50 (1985).

The limitation on states' sovereign immunity was essential to the effectiveness of the federal sovereign. The three branches of the federal government were roughly co-extensive in order to provide the requisite checks and balances. To resolve disputes effectively, the judicial branch had to possess jurisdiction over the entire federal domain to be "capable of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821). Article III of the Constitution provided for two basic types of jurisdiction: subject matter jurisdiction and

8. K. Schneider, "Energy Department Faulted on Dealing With Nuclear Waste", N.Y. Times, June 7, 1988 at A22.

9. See 2 Tox. Tort Rep. (BNA) 756-57 (1987) citing testimony of the Department of Defense before Congress; DOD, "Defense Environmental Restoration Program: Annual Report to Congress for Fiscal Year 1987," March 1, 1988 at 14.

10. By contrast, the failed Articles of Confederation were a compact of the states and operated only on the states, not citizens.

party jurisdiction. Subject matter jurisdiction extended to "... all cases, in law and equity, arising under the Constitution, the laws of the United States, and Treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction ..." Party jurisdiction was more specific and, as relevant hereto, extended "... to controversies between two or more states; between a state and citizens of another state; ... and between a state, or the citizens thereof, and foreign states, citizens or subjects." Nothing in Article III or other parts of the Constitution, as originally ratified, expressed or implied that states were immune from suit in the federal sphere.

The Judiciary Act of 1789 codified Article III's grant of jurisdiction in state-citizen diversity actions. Ch. 20, §13, 1 Stat. 73, 80. As one scholar has pointed out, the Judiciary Act was passed only a month after the House of Representatives killed a proposed amendment to eliminate the state-citizen diversity clause from Article III of the Constitution. Fletcher, *supra.*, 35 Stan. L.Rev. at 1052-53.

The States' amici brief incorrectly contends that state immunity from suit brought by citizens in federal court was embodied in the Constitution as ratified. Ignoring the precise words of Article III which give the judiciary jurisdiction over such suits in diversity cases as well as the more general grant of jurisdiction in federal subject matter cases, the states' rely on isolated remarks of Madison, Marshall and Hamilton made in *The Federalist* and the Virginia debates.[11] However, scholars who have recently researched the historical records of the Constitutional Convention and the ratification debates suggest that the cited remarks of Madison, Marshall and Hamilton addressed federal diversity jurisdiction, not federal subject matter jurisdiction.[12] Four members of this Court have

11. A plurality of this Court recently concluded that "at most" "the intentions of the Framers and Ratifiers were ambiguous." *Welch*, 107 S.Ct. at 2951.

12. *See, e.g.*, Jackson, "The Supreme Court, the 11th Amendment and State Sovereign Immunity," 98 Yale L.J. 1 (forthcoming, Oct. 1988); Amar, *supra.*, 96 Yale L.J. at 1475; Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," 83 Colum. L.Rev. 1889, 1913 (1983); Fletcher, *supra.*, 35 Stan. L.Rev. at 1063.

observed that important delegates at ratification conventions such as Mason, Henry, Pendleton, Randolph, and Wilson "did not believe that state sovereign immunity provided protection against suits initiated by citizens of other states." *Welch*, 107 S.Ct. at 2962-63 (dissent); *Atascadero*, 473 U.S. at 264-80 (dissent). Two of these individuals, Randolph and Wilson, had served as members of the Committee of Detail at the Constitutional Convention.

Thus, as drafted, the Constitution lacked any substantive grant of state sovereign immunity and specifically opened the federal courts to certain types of suits against states.

B. The Eleventh Amendment Precludes Federal Court Jurisdiction Only In Actions Brought By Individuals Against States Based On Diversity of Citizenship

The Eleventh Amendment is not a broad grant of state sovereign immunity but a narrow jurisdiction preclusion provision. The Amendment makes no mention of substantive sovereign immunity. It provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The congruence between the language of the Amendment and Article III, section 2 of the Constitution is apparent ("The judicial power shall extend ... to controversies ... between a state ... and foreign ... citizens or subjects"), and strongly suggests that only cases brought against states by citizens of other states or aliens on the basis of diversity of citizenship were barred from federal jurisdiction.

We know, of course, that the Eleventh Amendment was

added to the Constitution to reverse this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* involved an action in assumpsit to recover for goods sold by a South Carolina merchant to Georgia during the Revolutionary War. In a 4-1 decision, this Court held that the state-citizen diversity clause of Article III of the Constitution conferred original jurisdiction on this Court. James Wilson and Edmund Randolph participated in the case, respectively, as a justice of this Court and the Attorney General of the United States representing the plaintiff.

The decision in *Chisholm* is free of any doubt that the majority and lone dissenter understood that jurisdiction was based on the state-citizen diversity clauses of Article III of the Constitution and section 13 of the Judiciary Act. *See* 2 U.S. (Dall.) at 466 (J. Wilson) and 431 (J. Iredell, dissenting). Justice Iredell, a proponent of state sovereign immunity, acknowledged that the United States was sovereign as to all powers surrendered by the states, with state sovereignty limited to the powers reserved to the states. 2 U.S. (Dall.) at 435 (dissent). Implicit in his opinion is that states did not surrender their sovereignty to be sued in federal court for breach of contract. Thus, Justice Iredell did not contend that states were immune from suit in federal court in all circumstances. *See*, also, *Atascadero*, 473 U.S. at 283 (dissent).

After ratification of the Eleventh Amendment,[13] but before *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted the Amendment literally and narrowly as precluding only federal court jurisdiction in state-citizen diversity cases. The states did not even raise the Eleventh Amendment as a jurisdictional bar in three cases brought between 1810 and 1819 where the appellate jurisdiction of this Court was invoked by individuals suing states. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch.) 164 (1812); *Smith v. Maryland*, 10 U.S. (6 Cranch.) 286 (1810). Eventually when the Eleventh Amendment was raised as a defense, this Court found the Eleventh Amendment did not preclude federal appellate jurisdiction in an action by a citizen against his own state, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), or original jurisdiction in an action against a state official based on federal law to recover money deposited in a state treasury. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Cohens*, Chief Justice Marshall addressed the conflict between Article III jurisdiction and state sovereign immunity as follows:

> . . . are we at liberty to insert in this [Article III] general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case. *Id.*, at 382-383.

13. Ironically, Pennsylvania's legislature refused to ratify the Eleventh Amendment. See *Mayle v. Pennsylvania*, 479 Pa. 384, 402, 388 A.2d 709, 718 (1978).

C. *Hans v. Louisiana* Should Be Overturned

Ninety-five years after ratification of the Eleventh Amendment, this Court extended the Amendment's coverage in a way never intended by Congress or the state legislatures that ratified it. *Hans v. Louisiana* was the culmination of a line of lawsuits that had reached the Supreme Court seeking payment on bonds which certain states, predominantly in the post-Civil War South, had repudiated. *See* Gibbons, *supra.*, 83 Colum. L.Rev. at 1968-2002. Hans, a citizen of Louisiana, sought to enforce payment of interest on a bond issued by Louisiana in 1874 where payment had been guaranteed by an amendment to Louisiana's constitution. In 1879, Louisiana amended its constitution to repudiate the bond. Hans claimed that the 1879 amendment to Louisiana's constitution impaired his contract in violation of Article 1, section 10 of the United States Constitution. Federal court jurisdiction was premised on the "arising under" clause of Article III and the 1875 Act of Congress which codified general original federal question jurisdiction. 18 Stat. 470.

This Court held that the Eleventh Amendment precludes federal court jurisdiction over suits by individuals against states irrespective of whether jurisdiction is founded on a federal question or state-citizen diversity. Though legitimate doubts have been raised as to whether the decision in *Hans* was grounded in the Constitution or merely upon the absence of a federal cause of action, *Atascadero,* 473 U.S. at 299-300 (dissent), this Court has recognized the former to be the case. *Monaco v. Mississippi,* 292 U.S. 313, 322-23 (1934). As a constitutional decision, the reasoning in *Hans* is insubstantial and the precedent relied upon flawed. Recognizing the textual limitation of the Eleventh Amendment, Justice Bradley relied in the opinion on the 1798 decision of this Court in *Hollingsworth v. Virginia,* 3 U.S. (3 Dall.) 378, and an ante-constitutional view of sovereign immunity as expressed in Justice Iredell's dissent in *Chisholm* and Alexander Hamilton's view in *The Federalist,* No. 81.

Justice Bradley contended that *Hollingsworth* showed the understanding of the Supreme Court in 1798, just after ratification of the Eleventh Amendment, that the Amendment applied to federal question as well as state-citizen diversity suits. The *per curiam* opinion in *Hollingsworth* is a single line stating "there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state." *Id.* at 382. *Hollingsworth* was an action in equity to quiet title to disputed lands, so that no federal question was involved. I J.Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801,* 725 (1971). Indeed, the sole issue in *Hollingsworth* was whether the Eleventh Amendment applied prospectively or retroactively. It would seem a leap of logic, therefore, for Justice Bradley to contend in *Hans* that the words "in any case" referred to both federal question and state-citizen diversity cases when quite apparently they refer to "past or future" cases. Furthermore, if Justice Bradley were correct in his interpretation, it is nothing less than astounding that Chief Justice Marshall and counsel for the parties in *Cohens v. Virginia* failed to cite or allude to

Hollingsworth which was then one of the few Supreme Court cases mentioning the Eleventh Amendment.

Justice Bradley's reliance on an ante-constitutional view of state sovereign immunity has been almost universally criticized in recent years. The dissenting opinions in *Employees, Atascadero, Pennhurst* and *Welch* digest the recent scholarly research and point out that Justice Bradley reached the wrong conclusions from his quotations from Justice Iredell and Alexander Hamilton. It bears emphasizing that the central premise in Justice Bradley's argument was that *Chisholm* was wrongly decided. Yet an adverse popular reaction to *Chisholm* does not require the conclusion that the case was wrongly decided. Rather, as contended above, *Chisholm* was a correct constitutional decision that was overturned by the political act of amending the Constitution.

D. Overturning *Hans v. Louisiana* Will Have a Salutary Effect on Eleventh Amendment Jurisprudence

The holding in *Hans* has spawned a raft of legal fictions that would otherwise be unnecessary. For example, individuals may sue state officials to obtain injunctive relief so long as the state is not named as a defendant. *Ex Parte Young,* 209 U.S. 123 (1908). Another example, individuals may sue states for monetary relief where Congress has abrogated states' Eleventh Amendment immunity or the states have consented to suit. *Fitzpatrick v. Bitzer, supra.*; *Welch v. State Dept. of Highways, supra.* While born of pragmatism, these fictions support an erroneous principle that should be cast aside.

Federal question jurisdiction has grown exponentially in the past 100 years with Congress regulating an ever growing list of fields. With that growth has come an increasing number of affirmative rights individuals may exercise. Several of these fields necessarily involve states. In many instances, individual rights cannot be vindicated unless individuals are able to sue states for wrongdoing, not just to obtain injunctive relief, but for monetary awards. That is especially

true in connection with CERCLA where Congress has legislated a solution to a festering environmental problem that is dependent on all individuals and legal entities, corporate and politic, voluntarily contributing to cleanups which the federal government alone cannot afford. To achieve a uniformity of enforcement, Congress gave the federal district courts exclusive original jurisdiction over CERCLA cases. 42 U.S. §9613(b). CERCLA is a program that is ill-suited to frustration by individual states jealous of their turf, yet that will be the result if individuals cannot sue states in federal court.

If the true underpinning of *Hans* is an ante-Constitutional concept of state sovereign immunity, that concept is itself outmoded. States have themselves largely dismantled the trappings of state sovereign immunity. The courts of over 30 states have partially or completely abolished sovereign immunity. *See*, K. C. Davis, *Administrative Law Treatise*, §25.00 (1980 Supp.). Pennsylvania's Supreme Court abolished the doctrine in that state in 1978. *Mayle v. Pennsylvania, supra.* Two years later, Pennsylvania's legislature enacted sovereign immunity as substantive law but created numerous exceptions. 42 Pa.C.S. §8521 *et seq.*

If, as Union Gas contends, *Hans* was wrongly decided, then the doctrine of *stare decisis* alone cannot support its continuation. *But see, Welsh*, 107 S.Ct. at 2956. While *stare decisis* is an important element in the fabric of the law, it is not of constitutional stature. To perpetuate a misinterpretation of the Constitution on the ground that wooden adherence to *stare decisis* demands it—is itself unconstitutional since it undermines the Supremacy Clause.

Furthermore, overturning *Hans* will not lead to chaos. There will be no change in the result in this case since CERCLA satisfies the clear statement rule. A current scholarly article analyzed the 17 Eleventh Amendment cases cited in the plurality decision in *Welch* and concluded there would be little change in the outcome of those cases so long as a less stringent version of the clear statement rule is retained. *See*, Jackson, *supra.*, note 12. Under that analysis, there would be no change in this Court's decisions involving federal question

claims brought under federal statutes. Jurisdiction of federal claims involving state taxation can be resolved under traditional doctrines of comity and abstention as can pendent state law claims. The result would be different, however, in admiralty and this Court's original jurisdiction cases, but such cases are relatively few and the need for uniformity of law in these areas is great.

Thus, *Hans* was a wrong turn for this Court and has spawned a progeny of cases that befuddle an otherwise straightforward interpretation of the Eleventh Amendment. As is especially evident in this case, its doctrine "intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct." *Atascadero*, 473 U.S. at 302 (dissent). Now is the time to sweep away this pernicious precedent.

III. ARTICLE I OF THE CONSTITUTION EMPOWERS CONGRESS TO ABROGATE STATE IMMUNITY TO PRIVATE LAWSUITS

The anomalies in Eleventh Amendment jurisprudence caused by this Court's wrong turn in *Hans* now force this Court to consider whether Congress has authority to abrogate the Eleventh Amendment's jurisdictional preclusion in Article I enactments. A decision on this issue is unnecessary if *Hans* is overturned.

A. Prior Decisions of This Court Have Acknowledged the Constitutionality of Article I Abrogation

The Eleventh Amendment does not embody a substantive rule of state sovereign immunity. Indeed, the Amendment is simply a jurisdiction preclusion clause. To the extent that states enjoy sovereign immunity within their borders on matters of state law, that immunity derives from the common law or state constitutional or legislative enactment. It follows, then, that the Eleventh Amendment imposes no limitation on Congress' plenary power under Article I to enact laws declar-

ing that persons may recover damages from states for violation of federal law.

This Court has recognized the above rule in its Eleventh Amendment jurisprudence.[14] In *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), where this Court held that Congress had abrogated state immunity in a commerce clause enactment, this Court declared:

> While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," *Great Northern Life Ins. Co. v. Read, supra,* 322 U.S. 47, 51, 88 L.Ed. 1121, 1125, 64 S.Ct. 873, the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
>
> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." *Gibbons v. Ogden*, 9 Wheat 1, 196-197, 6 L.ed. 23, 70.
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> * * *
>
> The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal

14. So too has every court of appeal addressing the issue: *Union Gas II*, 832 F.2d at 1356 (Pet. App. 64-65a); *In re McVey Trucking*, 812 F.2d 311, 328 (7th Cir. 1987) *cert. denied* 108 S.Ct. 227 (1987); *County of Monroe v. Florida*, 678 F.2d 1124, 1128-35 (2d Cir. 1982) *cert. denied*, 459 U.S. 1104 (1983); *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1074-82 (5th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979).

> government in the Constitution . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.
>
> By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. *Id.* at 191-92.

This Court followed the above rule in *Employees*, a case involving an amendment to the Fair Labor Standards Act enacted pursuant to Article I's commerce clause. Although this Court held that Congress had not satisfied the clear statement rule, the Court nonetheless reaffirmed that Congress was authorized to abrogate state immunity from suit in Article I enactments stating:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. *Id.* 411 U.S. at 284.

More recently, this Court has assumed the continued validity of this rule, *Welch* at 2946 (plurality opinion), and declined to review it. *See*, e.g., *Edgar v. McVey Trucking*, 108 S.Ct. 227 (1987).

Pennsylvania and amici contend that decisions by this Court in Fourteenth and Fifteenth Amendment cases undermine the rule's vitality. In particular, they contend this Court's statements in *Fitzpatrick* support their argument:

> But we think the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890) are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.

* * *

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. 427 U.S. 445 at 457.

The "other contexts" adverted to in the above quote are not Article I enactments as suggested by Pennsylvania. Petitioner's Brief at 40. The narrow issue in *Fitzpatrick* was whether the Eleventh Amendment restricted Congress in rendering states liable to individuals in Fourteenth Amendment enactments. The Fourteenth Amendment, after all, bestowed on Congress the power to legislate in areas such as the states' justice systems that traditionally had been wholly in the states' sphere. But for the Amendment, Congress had no authority to invade the states' sphere and render them liable to private parties. The Court's vague reference to "other contexts," then, suggests that the Court will carefully examine intrusions into the states' central government activities in Fourteenth Amendment enactments which render the states' liable to private parties.[15]

B. Principles of Federalism Require that Congress' Plenary Power Under Article I Not Be Diminished By A Judicial Inability to Enforce Its Enactments

Congress' power under Article I to subject states to suit in federal court manifests itself in the interplay among Article I, the Supremacy Clause and the Eleventh Amendment. If, as the Constitution declares, the Constitution and laws made by Congress are to be the supreme law of the land, Congress must have authority to regulate the conduct of the states under Article I, and the judiciary must have authority to

15. See Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines," 126 U. Pa. L.Rev. 1203, 1233 (1978).

enforce Congress' laws.[16] Sovereignty cannot inhere in authority bereft of the means of enforcement. Only if construed as a narrow jurisdiction preclusion clause is the Eleventh Amendment consistent with this concept.

The Constitution cannot be read on a timeline with the Eleventh Amendment as a watershed controlling under which provision of the Constitution Congress can regulate states by making them subject to private suits for money damages. To do so would impinge on Congress' ability to establish uniform federal policy and regulate the states regarding its primary governmental functions specified in Article I yet permit Congress to regulate the states in areas traditionally peripheral to Congress' role. Such an interpretation would be illogical. As this Court stated in *Prout v. Starr*, 188 U.S. 537, 543 (1903):

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the Eleventh, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts . . . —all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.

16. See Tribe, "Intergovernmental Immunities in Litigation, Taxation and Regulation," 89 Harv. L.Rev. 682, 694 (1976).

The non-unitary concept of the Constitution espoused by Pennsylvania and amici has its basis in a misreading of *Fitzpatrick*. While *Fitzpatrick* drew upon the fact that the Fourteenth Amendment post-dated the Eleventh, it did so only to make the point that the states willingly surrendered to Congress broad powers traditionally within the states' sphere notwithstanding the existence of the Eleventh Amendment. *Fitzpatrick* did not eviscerate the Necessary and Proper Clause of Article I, §8, by limiting judicial enforcement of otherwise proper congressional enactments. The Eleventh Amendment, by its own terms, cannot limit congressional power since it is directed solely at judicial power.

Again, this case illustrates the harm that would be wrought by a limitation on Congress' power to render states liable to private parties for cleanup costs. Because the federal courts have exclusive jurisdiction over CERCLA causes of action, private parties like Union Gas are limited to suing in federal court. If a state cannot be sued by private parties, private parties will resist or delay voluntary cleanup of a site in hopes that the EPA will undertake the cleanup and sue the state. Likewise, a state will have an incentive to avoid funding a cleanup in hopes that private parties will do so. The resulting standoff frustrates the congressional scheme and unduly strains the limited resources of the Superfund trust fund.

The states' protection from congressional abuse of its Article I power is found in the structure of the Constitution itself. *South Carolina v. Baker*, 108 S. Ct. 1355 (1988) As this Court observed in *Garcia*, Congress consists of senators and representatives elected in each of the fifty states, and they are responsive to states' concerns. *Supra*, 469 U.S. at 550. "It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreacting by Congress." *Id.* at 551. States' direct linkage to federal lawmakers insures that the states interests will be considered. Furthermore, federal law-making does not occur in a vacuum—states frequently take a direct role in lobbying congressmen and presenting testimony supportive of their position, as they did when CERCLA and SARA were enacted.

The framers of the Constitution properly envisioned a

judiciary whose jurisdiction was coextensive with Congress' Article I powers, and the Eleventh Amendment should not be construed to distort that vision.

IV. STATE CONSENT IS NOT A PREREQUISITE TO CONGRESSIONAL ABROGATION

State consent to suit is superfluous where, as in CERCLA, Congress abrogated state immunity to suit. Unlike *Parden*, it is unnecessary to imply Pennsylvania's consent to suit for participating in a federally regulated area since Congress unmistakably expressed its intention to subject states to liability under section 107(a) of CERCLA.

The clear statement rule is a standard of judicial interpretation—it was not intended as a general notice provision. CERCLA, as originally enacted, put states as well as other individuals and entities on notice that they were "persons" who could sue and be sued under section 107(a). Thus, Pennsylvania received as much notice as Union Gas and all other "persons" of their rights under CERCLA.[17] The mere fact that CERCLA imposes liability based on a person's status creates no unfairness to states that is not visited on all other persons. If, as numerous lower courts have held, CERCLA's imposition of retroactive liability is constitutional under the Fifth Amendment Due Process Clause,[18] notice is irrelevant and no Eleventh Amendment issue is even implicated.

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17. The notice issue raised by Pennsylvania is also irrelevant since both before and after passage of CERCLA, the seepage of coal tar from the Brodhead Creek site continued while Pennsylvania was an owner and operator of the site.

18. *See U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986) and cases cited therein.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals in *Union Gas II* should be affirmed and the case remanded to the district court for further proceedings.

Respectfully submitted,

July 11, 1988

Robert A. Swift*
Marguerite R. Goodman
KOHN, SAVETT, KLEIN & GRAF, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Lawrence Demase
ROSE, SCHMIDT, CHAPMAN,
DUFF & HASLEY
900 Oliver Building
Pittsburgh, PA 15222
(412) 434-8610

Attorneys for Respondent
Union Gas Company

*Counsel of Record